

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:

MSR RESORT GOLF COURSE, LLC,
et al,

Debtors.

.
. Chapter 11
. Case No. 11-10372 (SHL)
. New York, New York
. Tuesday, July 31, 2012
. 4:09 p.m.

.
BENCH RULING RE: TRIAL ON MOTION OF MSR RESORT GOLF COURSE,
LLC, ET AL, FOR ENTRY OF AN ORDER ESTIMATING DAMAGES
RESULTING FROM REJECTION OF THE HILTON MANAGEMENT AGREEMENTS
AND AN ORDER AUTHORIZING REJECTION OF THE HILTON MANAGEMENT
AGREEMENTS

**BEFORE THE HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE**

APPEARANCES:

For the Debtors:

Chad J. Husnick, Esq.
KIRKLAND & ELLIS, LLP
300 North LaSalle
Chicago, Illinois 60654

Atif Khawaja, Esq.
Eric F. Leon, Esq.
KIRKLAND & ELLIS, LLP
601 Lexington Avenue
New York, New York 10022

(Appearances Continued)

Audio Operator:

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APPEARANCES: (Continued)

For GIC RE: Brian E. Greer, Esq.
DECHERT, LLP
1095 Avenue of the Americas
New York, New York 10036

Also Appearing: Michelle J. Vladimirsky, Esq.
KASOWITZ, BENSON, TORRES
& FRIEDMAN, LLP
1633 Broadway
New York, New York 10019

APPEARANCES VIA TELEPHONE:

For Waldorf=Astoria
Management, LLC: David M. Neff, Esq.
Brian Audette, Esq.
PERKINS COIE, LLP
131 S. Dearborn Street, Suite 1700
Chicago, Illinois 60603

1 (Proceedings commence at 4:09 p.m.)

2 THE COURT: Good afternoon.

3 MR. LEON: Good afternoon, Your Honor.

4 THE COURT: All right. We are here this afternoon for
5 the purpose of reading a bench decision in the estimation trial
6 that we had earlier this month.

7 And I will apologize for subjecting to you all to a
8 lengthy, dramatic reading. As we discussed, my preference
9 probably would have been to prepare a written opinion in a case
10 like this, but timing is sensitive in this case; I want to get
11 the parties a decision quickly.

12 Let me just make sure everybody who's on the phone can
13 hear me. I suppose that most folks are listen-only, but I'm
14 particularly concerned with Hilton's counsel, Mr. Neff.

15 MR. NEFF: (Via telephone) Yes, Judge. This is Mr.
16 Neff. I can hear you well. Thank you.

17 THE COURT: All right. This matter comes before the
18 Court on the April 24, 2012 motion of MSR Resort Golf Course,
19 LLC, et al., for entry of an order estimating damages resulting
20 from rejection of the Hilton Management Agreements, and an
21 order authorizing rejection of the Hilton Management
22 Agreements, which I'm going to refer to as "the motion."

23 In the motion, the debtors seek estimation of the
24 damages Hilton would sustain if the debtors reject three
25 management agreements.

1 The management agreements relate to three properties:
2 one, the Arizona Biltmore Resort & Spa in Phoenix, Arizona;
3 two, the La Quinta Resort and Club PGA West in La Quinta,
4 California; and three, the Grand Wailea Resort Hotel & Spa in
5 Maui, Hawaii.

6 The Court conducted a trial on this matter over the
7 course of five days: June 27th, 29th, July 2nd, 3rd, and July
8 13th. The Court at trial heard from five fact witnesses and two
9 experts on behalf of Hilton and one fact witness and one expert
10 witness on behalf of the debtors, in addition to materials
11 submitted by the debtors as part of their motion.

12 In connection with acquiring these three management
13 agreements, Hilton prepared a November 2005 investment
14 memorandum. That memorandum contained Hilton's then present
15 value of the future revenues from the three agreements at
16 roughly \$260 million. That valuation of the three management
17 agreements was "predicated on realizing incentive fees," fees
18 that are provided for under certain circumstances in the three
19 management agreements.

20 Hilton assumed it would achieve incentive fees
21 starting in 2006, and would achieve the maximum contractual
22 incentive fee starting in 2010. At that time, in 2005, it
23 further assumed it would continue to receive the three percent
24 maximum incentive fee stream until the end of the contractual
25 term.

1 For a variety of reasons that were discussed on and
2 off at the trial, Hilton did not receive the incentive fee
3 stream it anticipated. It has not, in fact, received any
4 incentive fees under these management agreements since 2007.
5 It does not seek the payment of incentive fees as part of the
6 damages sought in this proceeding.

7 Hilton's 2005 valuation was based on the full thirty-
8 year term, including the seven years from 2006 to 2012, for
9 which it has already received payment; and to date, it's
10 received \$79 million in fees under the management agreements.

11 Turning to the three management agreements here, they
12 contemplate certain payments to the hotel manager. For
13 purposes of the Court's inquiry, these provisions regarding
14 payment are the same for the three agreements.

15 The first category of payments under the management
16 agreements is the management fee, set forth in Article 5.1 of
17 the management agreements. Under Article 5.1, the management
18 fee includes a base fee and an incentive fee that we've already
19 discussed. The management agreement defines the "base fee" for
20 management services as:

21 "An amount equal to two percent (2%) of gross
22 revenues."

23 The incentive fee, as mentioned earlier, is triggered
24 only if Hilton satisfies certain performance thresholds, which
25 are not at issue in this proceeding.

1 The second category of payments contemplated by the
2 management agreements is something called the "corporate
3 overhead fee." Pursuant to Article 5.3 of the agreements, a
4 manager will receive a corporate overhead fee for corporate
5 overhead expenses that it incurs in connection with managing
6 the resorts. In the words of Article 5.3, the manager is
7 "reimbursed" for corporate overhead in the amounts equal to one
8 percent of gross revenues.

9 The third category of payments contemplated by the
10 management agreements is the so-called "group services
11 expense." Article 5.2 of the management agreements provides
12 for the manager to receive reimbursement for group services
13 expense in the amount of up to two percent for each of the
14 resorts' revenues. Group services expense is used to fund
15 marketing, advertising, reservations, and other promotional
16 services that the manager provides in managing the resorts.

17 Several other provisions of the management agreements
18 are relevant to this dispute, although they are not payments
19 that Hilton seeks as part of the proceedings.

20 The first of these is the Article 6 provision for
21 capital expenditures. Under that provision, the debtors --
22 that is, the owners -- are obligated to contribute four percent
23 of gross resort revenue to fund necessary capital expenditures
24 at each resort. To the extent the manager believes funding of
25 additional capital expenditures is required beyond the four

1 percent, the management agreements require the manager to seek
2 approval from the debtors. If there is a disagreement over the
3 amount of capital expenditures needed, the manager may pursue
4 that dispute by putting the debtors on formal notice of a
5 contractual conflict and pursue a dispute resolution procedure
6 to resolve the matter.

7 Other relevant provisions in the management agreements
8 include a provision regarding the terms of the agreements, with
9 the term to run through 2024, with a ten-year option out to
10 2034.

11 The management agreements also have a provision
12 addressing termination. In that provision, the debtors have
13 the right to terminate the agreements without the payment of
14 any additional fee or premium if the manager fails to satisfy
15 certain performance requirements. Specifically, the debtors
16 may terminate the management agreements without penalty if,
17 after 2010 and for two consecutive operating years:

18 "(i) the GOP (gross operating profits) achieved by the
19 Hotel for each Operating Year is less than ninety percent (90%)
20 of the GOP set forth in the approved Annual Operating Plan for
21 such Operating Year." And this has been referred to as the
22 gross operating profit test."

23 "(ii) the Annualized RevPAR (revenue per available
24 room) for the Hotel for each of such Operating Years is less
25 than ninety-five percent of the Annualized RevPAR of the

1 Competitive Set for each respective Operating Year." And
2 that's been referred to as the "RevPAR performance test."

3 If the manager, here Hilton, fails to satisfy the
4 performance tests, and thus faces termination, it can make a
5 cure payment to the debtors to avoid termination and continue
6 managing the resorts.

7 The final provision that is relevant in the management
8 agreements for our purposes is a liquidated damages provision.
9 And that provides that if, after 2024, the debtors sell the
10 resorts and terminate Hilton as manager, Hilton is entitled to
11 a specified termination fee in the amount equal to the product
12 of the total management fee paid or payable by the manager for
13 the twelve-month period prior to the effective date of
14 termination, multiplied by a specified multiplier that varies
15 under the circumstances, and which we don't need to address in
16 this proceeding.

17 Turning now to the governing legal standard for this
18 dispute, the Court observes that each of the management
19 agreements is governed by the laws of the state in which the
20 subject resort is located. Accordingly, the laws of Arizona,
21 California, and Hawaii will govern the calculation of damages
22 to which Hilton will be entitled upon the rejection of each
23 respective management agreement.

24 These three states generally agree that, in a breach
25 of contract action, a plaintiff may recover the amount of

1 damages necessary to place it in the same position it would
2 have occupied had the breach not occurred. The usual recovery
3 for the breach of a contract is the contract price or the lost
4 profits therefrom.

5 To calculate lost profits, expenses are subtracted
6 from revenue. Only net profits, not gross profits, are
7 recoverable for breach of contract. These depend on the
8 particular transaction at issue, which dictates what expenses
9 need to be deducted from the gross profits to determine the
10 appropriate figure.

11 Arizona Courts have recognized that compensatory
12 contract damages will be awarded for the net amount of losses
13 caused and gains prevented. See Biltmore Evaluation &
14 Treatment Services v. RTS NOW, LLC, 2009 WL 223293, at *2
15 (Ariz. Ct. App. Jan. 29, 2009). Similarly, California Courts
16 have observed that damages are based on net profits, which they
17 have consistently defined as gains made after deducting the
18 value of labor, materials, rents, and all expenses, together
19 with the interest of the capital employed. See Electronic
20 Funds Solutions v. Murphy, 36 Cal. Rptr. 3d 663, 676 (Cal Ct.
21 App. 2005). Finally, Hawaii has recognized that a non-
22 breaching party may recover damages that arise naturally from
23 the breach, or that were in the contemplation of the parties at
24 the time of contracting. See Jones v. Johnson, 41 Haw. 389,
25 1956 WL 10315, at *3 (Haw. 1956).

1 The Court notes that the parties do not disagree about
2 what the applicable law is, although they strongly disagree
3 with how it should be applied in this case. Applying the
4 applicable law and relevant provisions of the management
5 agreements, the parties reach very different conclusions about
6 the proper measure of damages.

7 The Court notes that both parties use an expert to
8 provide a breakdown of the respective numbers on damages, as
9 well as an explanation of how each component is calculated.
10 Hilton's expert for this purpose was Roger Cline, and the
11 debtors' expert for this purpose was Thomas Morone.

12 On the one hand, Hilton contends it is entitled to
13 \$334 million for rejection of these three management
14 agreements. Hilton's requested \$334 million is broken into
15 four general categories:

16 First, it seeks damages of some \$165 million for fees
17 under the three management agreements. These fees include a
18 base fee and the corporate overhead fee but do not, as
19 previously mentioned, include any damages for an incentive fee.

20 A large difference between the parties' calculation of
21 damages results from their use of different discount rates to
22 provide a current valuation for the worth of the payments that
23 Hilton would receive in the future. Hilton uses an eight
24 percent discount rate.

25 The second component of damages that Hilton seeks is

1 for group services expenses of approximately \$38.9 million.

2 Third, Hilton seeks damages of approximately \$120
3 million for so-called "brand damages." It describes "brand
4 damages" as the impact of the rejection of these three
5 management agreements on its Waldorf=Astoria brand.

6 Fourth and finally, Hilton seeks approximately \$9.8
7 million in damages for losses relating to what it alleged to be
8 debtors' plan to expand the Grand Wailea Resort by some 300
9 rooms in the near future, thus purportedly expanding the
10 profits that Hilton would receive under that particular
11 management agreement.

12 Debtors, on the other hand, see things far
13 differently. They argue that Hilton is only entitled to
14 approximately \$46 million in damages. Of the three categories
15 of damages sought by Hilton, debtors claim that Hilton is
16 entitled only to the first, the management fee, and that the
17 management fee should consist solely of the base fee. Thus, in
18 debtors' view, Hilton should get no damages for the corporate
19 overhead fee, group services expense, brand damages, and the
20 Grand Wailea expansion.

21 Moreover, debtors arrive at their figure of \$46
22 million only after subtracting certain money for cure payments
23 that debtors contend Hilton will have to make for failing to
24 meet the performance test in the future at the Grand Wailea
25 Resort.

1 I turn first to the issue of the management fees. And
2 in looking in that, the Court must first project the fees per
3 year that Hilton would earn under the management agreements and
4 reduce these profits by the expenses that Hilton would incur to
5 arrive at a profit margin. In doing that, one looks to the
6 total projected revenues at the Resorts as these revenues are
7 used to calculate the fees.

8 Mr. Morone and Mr. Cline's projections for the resorts
9 as, one witness put it, "quite close." Roger Cline, Hilton's
10 expert, projects approximately \$14.6 billion in revenue.
11 Thomas Morone, an expert for the debtors, opines that the
12 projected revenue for purposes of the management agreements is
13 approximately \$13 billion.

14 There are only two real differences between these two
15 different predictions of revenue. The first is the inflation
16 rate, where Mr. Cline uses three percent and Mr. Morone uses
17 2.5.

18 The Court concludes that the appropriate inflation
19 rate is 2.5. The Court finds that Mr. Morone reasonably relied
20 on historical data from the Bureau of Labor and Statistics.
21 That data shows the inflation rate for the past ten years at
22 2.4 percent. And he adjusted upwards to account for the
23 slightly higher twenty-year historical average of 2.6 percent,
24 resulting in his inflation rate of 2.5.

25 The Court rejects Mr. Cline's figure, which he has

1 adopted from an appraisal firm HVS, which is a standard
2 inflation rate that they use for hotel appraisals. Mr. Cline
3 also relies on a website called "forecastchart.com" to conclude
4 the appropriate rate is three percent. But he has not
5 submitted any evidence that forecastchart.com is a reliable
6 industry standard website. In any event, his reliance on
7 inflation rate used by another company without proffering any
8 evidence as to how it was determined or why it is appropriate
9 is insufficient to refute Mr. Morone's proposed inflation rate
10 based on historical data.

11 The second difference between the parties' predictions
12 is the level of capital expenditures to be made by the debtors
13 in the resorts. Mr. Cline assumes an eight percent
14 contribution by the debtors. In support of this number, Diane
15 Jaskulske, Hilton's witness, testified that Hilton averages
16 eight to ten percent of revenue annually for properties similar
17 in size and complexity as the resort. Matthew Bailey, Managing
18 Director of Grand Wailea, testified that four percent is simply
19 too low to maintain the operating standards under Hilton's
20 management agreement.

21 On the other hand, Mr. Morone utilizes a four percent
22 capital expenditure assumption, as per Article 6 of the
23 management agreements. Article 6 obligates the debtors to
24 contribute four percent of resort revenue to fund necessary
25 capital expenditures. Debtors argue that they have never

1 agreed to anything beyond the four percent, and that Hilton has
2 never formally requested any increase.

3 The Court finds that six percent is the appropriate
4 figure to use. The six percent, in fact, is derived from Mr.
5 Morone's testimony that the debtors have consistently spent six
6 percent, on average, on capital expenditures. The Court
7 rejects Hilton's eight percent as too high, given that Hilton
8 must follow certain procedures outlined in Article 6, in order
9 to receive additional capital expenditures funding beyond the
10 four percent reserve fund. And Hilton has never commenced the
11 dispute resolution procedure set forth in that article.

12 Hilton's position about the need for eight percent is
13 further undercut by the fact that Hilton, in its 2005 memo,
14 viewed the resorts to be in excellent shape before purchasing
15 these management contracts. And Mr. Bailey testified that, in
16 his view, the resort was in better shape today than it was at
17 the time of the purchase.

18 Moving on to the second component of damages, we turn
19 to the corporate overhead fee. The debtors' expert Mr. Morone
20 deducted the corporate overhead fee as a reimbursed expense,
21 while Hilton's expert Mr. Cline included the full one percent
22 of the corporate overhead fee in his calculation of lost
23 profits and deducted no expense incurred by Hilton in managing
24 the resorts.

25 In contending that the corporate overhead fee is a

1 reimbursement, rather than profit, debtors rely, among other
2 things, upon the language in Article 5.1 of the management
3 agreement, which expressly states that the corporate overhead
4 fee is to be reimbursed to the manager. They also note that
5 Section 1 of the management agreement states that the
6 management fee includes only the base and incentive fees, and
7 that the corporate overhead fee is never described as
8 "consideration" for Hilton's performance under the management
9 agreements. Debtors finally note that the liquidated damages
10 and termination provisions do not contemplate corporate
11 overhead fees being incorporated as liquidated damages in the
12 event of termination.

13 For Hilton's part, its expert Mr. Cline assumed no
14 expense for corporate overhead and payment of the full one
15 percent of profit. His conclusions were echoed by Hilton's
16 witness Diane Jaskulske, who testified that she was ninety-nine
17 percent certain that losing the resorts will not change "one
18 iota of what [is done in the] corporate office." Hilton's
19 corporate offices, she said, rarely assist directly in
20 providing services to the resort.

21 Instead, Hilton views corporate overhead fee as merely
22 a term that Hilton inherited when it acquired the management
23 agreements from the resorts' former manager KSL. As Hilton's
24 witness Ted Middleton explained, the corporate overhead fee is
25 simply viewed by Hilton to be analogous -- that is, the same --

1 as the two percent base fee.

2 Based on all the evidence before the Court and the
3 applicable law, the Court concludes that Hilton is entitled to
4 the corporate overhead fee, provided that appropriate
5 deductions are made for expenses. Even though the management
6 agreements do not include the corporate overhead fee as part of
7 the management fee, there is no dispute that the fee would have
8 been earned had the debtors not rejected the Hilton Management
9 Agreements.

10 Further, Section 5.3 does not state that the corporate
11 overhead fee is reimbursable or subject to a cap like
12 reimbursable expenses. The management agreements only provide
13 that Hilton is to receive one percent of gross revenues.

14 While the debtors argue that the termination provision
15 is persuasive, the termination provision reflects an agreement
16 between the parties as to the amount that the debtors would
17 have to pay at a much later date to terminate the agreements,
18 as opposed to proof of actual damages. And those items are not
19 necessarily the same. See, e.g., Vrgora v. Los Angeles Unified
20 School Dist., 200 Cal. Rptr. 130, 135 (Cal. Ct. App. 1984),
21 explaining that liquidated damages are not necessarily a
22 proximation of actual damages suffered. See also Pima Sav. and
23 Loan. Ass'n v. Rampello, 812 P.2d 1115, 1118 (Ariz. Ct. App.
24 1991), explaining liquidated damages need not approximate
25 actual loss.

1 However, the Court finds that Hilton's 2006 10-K form
2 is persuasive in suggesting that Hilton does incur additional
3 annual overhead expenses when adding new properties to the
4 portfolio. Indeed, the Court rejects as incredible the
5 testimony of various witnesses that there is no corporate
6 overhead associated with these resorts, which all parties
7 describe as "iconic," and indisputably far more complex than a
8 typical hotel managed by Hilton.

9 As to the exact measure of these corporate overhead
10 expenses, the Court will use Hilton's own estimate of such
11 expenses in its 2005 internal memorandum, which was prepared
12 before purchasing these management agreements. That memorandum
13 calculates its expected cost of managing the resorts at .25 of
14 revenues, or 8.33 percent of a three percent base management
15 fee.

16 The Court rejects as self-serving the only other
17 evidence of the actual amount of corporate overhead, which was
18 an estimate prepared by Hilton's treasurer solely for the
19 purpose of this litigation.

20 The Court now turns to the applicable discount rate.
21 A discount rate must be applied to calculate the present value
22 of future payments owed to Hilton under the management
23 agreements, to account for the time value of money and the
24 financial risk of the fee stream. See In re Chemtura Corp.,
25 448 B.R. 635, 673 (Bankr. S.D.N.Y. 2011).

1 In Chemtura, Judge Gerber noted that the discount rate
2 should be calculated at the time the contract was entered into.
3 Chemtura, at 677.

4 "Existing case law and common sense require that the
5 discounting to fix the damages award must reflect the
6 same payment risk insofar as the Court can accomplish
7 that as the original contract did."

8 Id. at 673.

9 The choice of an appropriate rate does not need to be
10 exact. See Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S.
11 523, 552-553 (1983), where the Court notes:

12 "We do not suggest that a trial judge should embark on
13 the search for delusive exactness."

14 The Court may choose a discount rate not proposed by
15 the parties. See In re 785 Partners, LLC, 2012 WL 959364, at
16 *5 (Bankr. S.D.N.Y. Mar. 20, 2012), holding that, since the
17 experts did not thoroughly explain their determinations of the
18 discount rate, the Court treated their opinions as the range
19 and selected an intermediate rate.

20 Although the weighted average cost of capital -- which
21 we'll discuss a bit more in a moment -- or the "WACC," is a
22 reasonable starting point in determining the proper discount
23 rate, the WACC must be adjusted to account for risk. See In re
24 M Waikiki, LLC, 2012 WL 2062421, at *4 (Bankr. D. Haw. June 7,
25 2012).

1 Here, Hilton argues for an eight percent discount
2 rate. It contends that the risk of the management agreements
3 at the time they acquired them were de minimis. It contends
4 that eight percent is the industry standard, and it's what
5 Hilton uses to value its own management fees contracts. It
6 notes that the base management fee here is less risky than
7 other revenue streams because it is paid first from the hotel
8 revenue and, thus, far less risky than fees that are a function
9 of hotel profitability.

10 One Hilton expert, Mr. Hennessey, testified that the
11 proper discount rate was 7.5 percent, based among a variety of
12 things, including: mortgage rates for full service hotels as of
13 April 2006; and the rate generally utilized for hotel
14 investments as of April 2006. He also considered the WACC at
15 the time Hilton acquired the resorts and adjusted it downward
16 to, in his view, achieves a discount rate applicable to the
17 hotel company's reliable income stream derived from base
18 management fees. In his report, he referenced a report by Bear
19 Stearns, which gave Hilton's WACC at 8.1 percent. He also
20 testified he looked at Bloomberg, which reported Hilton's WACC
21 at 8.7 percent as of December 31st, 2005, and 8.2 percent in
22 the first quarter of 2006.

23 Debtors again have a different view. Their expert,
24 Mr. Morone, applied a 13.6 percent discount rate to the Arizona
25 Biltmore and the hotel in California, and a 14.6 percent

1 discount rate to the Grand Wailea. He calculated Hilton's
2 overall weighted average cost of capital; the WACC, as of the
3 beginning of 2006, to be 10.6 percent. He noted that Mr.
4 Hennessey testified that Bloomberg's reported WACC of 8.7
5 percent relied on what's called a "beta" that was a default of
6 one percent; or, as Mr. Morone used, a beta of 1.29.

7 Beta is one of the components in calculating the WACC
8 for any company and measures that company risk in relation to
9 the rest of the market. Mr. Morone testified that the 1.29
10 beta is appropriate because Hilton stock was riskier than the
11 market as a whole, and for that he cited debtors' expert Derek
12 Pitts, who submitted an affidavit with the debtors' motion.

13 Mr. Morone adjusted Hilton's WACC to account for
14 property-specific risks, as the WACC reflects aggregate risk of
15 Hilton's entire diversified portfolio of management agreements,
16 relying on something called the "Ibbotson's Size-Risk Premium,"
17 Mr. Morone adjusted the WACC to reflect specific risks, such as
18 the size of the resorts, the brand, and the volatility as to
19 the Grand Wailea. He noted the Grand Wailea's additional risk,
20 in his view, included the remote location, the dependency on
21 air travel, the dependency on group travelers, and natural
22 conditions.

23 Based on the credible evidence and the applicable law,
24 the Court starts off by adopting the WACC used by Mr. Morone.

25 The difference between Bloomberg's WACC of 8.7 percent

1 and Mr. Morone's determination is that Mr. Morone used a beta
2 of 1.29, as opposed to a beta of one. The affidavit of
3 debtors' expert Derek Pitts provides support for the assertion
4 of using a beta of 1.29; and in fact, Mr. Pitts' affidavit
5 provides the only real analysis of beta in this case.

6 Using that beta and information from Hilton's own 10-
7 K, I reach the conclusion that Hilton's WACC at the time of
8 entering these management agreements was 10.6.

9 Mr. Hennessey opined that Hilton's WACC was 8.1, but
10 based his finding upon an internal Bear Stearns estimate
11 published in December 2006, almost a year after Hilton acquired
12 the resorts.

13 I also note that Hilton's expert makes reference to
14 Bloomberg's WACC. There was discussion at trial that Bloomberg
15 apparently uses a default beta of one. It was unclear from the
16 testimony -- indeed, no one seemed to know -- if that default
17 of one was used by Bloomberg in all instances for Hilton or
18 even in all instances for all companies. And as no party has
19 provided any explanation of the basis for using that default of
20 one here, the Court instead relies on the 1.29 beta, for which
21 analysis has been provided by Mr. Pitts.

22 On the one hand, Hilton has failed to establish that
23 the management agreements lack any risk, and that its eight
24 percent rate that it applies to all acquired management
25 agreements is sufficient to discount its future fees upon

1 rejection. Indeed, credible evidence has been presented
2 showing that these iconic resorts are exposed to unique risks
3 that make their revenue streams more volatile than a typical
4 Hilton property, supporting an upward adjustment of the WACC,
5 which represents the riskiness to Hilton's business as a whole.
6 Thus, the Court rejects the notion that the same risks apply to
7 these resorts as apply to the operation of one of Hilton's
8 Hampton Inns.

9 On the other hand, the debtors have failed to persuade
10 the Court that the attendant risks are as high as they claim.
11 There is credible evidence that the management fees here, taken
12 from gross revenues, rather than profits, are a less risky
13 source of revenue for Hilton than many of Hilton's other
14 revenue streams and other revenue streams at the resort.

15 For all these reasons, the Court will adjust the WACC
16 for the Arizona Biltmore and the La Quinta upward by one
17 percent, to arrive at a discount rate of 11.6. And this is to
18 account for the attendant risks identified by Mr. Morone and
19 discussed by Mr. Pitts.

20 The Court will adjust the WACC for the Grand Wailea by
21 two percent upwards, rather than one percent, to reach a
22 discount rate of 12.6, based on the aforementioned attendant
23 risks, plus additional risks unique to the Grand Wailea that
24 were discussed at the trial, and that have been mentioned
25 previously, including its location.

1 The one additional percent increase is also
2 appropriate to account for the possibility that the Grand
3 Wailea may fail the performance tests over the life of these
4 agreements. The credible evidence was that there have been
5 real economic struggles in the recent performance of the Grand
6 Wailea, which is perhaps the most iconic, and thus most unique
7 of these three resorts. These struggles have been evidenced by
8 various metrics that Hilton itself prepared, rating performance
9 at the resort. These difficulties no doubt have been
10 influenced by the current economic downturn and Grand Wailea's
11 location and unusual dependence on group bookings for success,
12 bookings that are incredibly sensitive to the economy.

13 Such an adjustment for risk of termination has been
14 recognized by the courts. See M Waikiki, 2012 WL 2062421, at
15 *4-5, adjusting the WACC upwards to account for performance-
16 based termination risk. See also Pet Food Express Ltd. v.
17 Royal Canin USA, Inc., 2011 WL 1464874, at *12 (N.D. Cal.
18 2011), noting that the failure to reduce damages due to
19 uncertainty of lost profits towards the end of an agreement
20 ignores the contingency in the agreement that would have
21 allowed a defendant to terminate the agreement prior to the end
22 of the term for plaintiff's failure to perform its contractual
23 duties and obligations.

24 The Court now turns to the related issue of cure
25 payments. Debtors' expert Mr. Morone deducted some \$7 million

1 in cure payments because he contends that Hilton will fail the
2 performance test and will need to make cure payments on two
3 occasions. First, in his view, it will fail in 2013 and '14,
4 and because the debtors can terminate the contract, Hilton will
5 need to make a cure payment of some \$6 million. As to the
6 second instance, based on a so-called "Monte Carlo Analysis,"
7 Mr. Morone concludes that Hilton will again fail the
8 performance test as to the Grand Wailea in 2031, prompting a
9 second cure payment of almost a million.

10 Mr. Morone believes that both these cure payments
11 should be deducted from Hilton's profits.

12 The Court rejects the debtors' arguments as unduly
13 speculative for several reasons. First, while the Court agrees
14 there is a risk that Hilton will fail the performance test at
15 the Grand Wailea, that failure has not been shown to the degree
16 of certainty so as to make it appropriate to deduct cure
17 payments from Hilton's profits. As already discussed, this
18 risk of failure should instead be accounted for in application
19 of the discount rate for the Grand Wailea.

20 Indeed, in reaching that conclusion, the Court notes
21 that the performance test here has been described as fairly
22 easy to satisfy by some observers. And while I won't go that
23 far, I do note that Hilton's operating requirements are based
24 in part on Hilton Resorts' annual operating plan that it itself
25 prepares.

1 Additionally, the Court notes that the Monte Carlo
2 Analysis is unduly speculative. Mr. Morone himself conceded
3 that he was unaware of its use in projecting future failure in
4 hotel management contracts. Indeed, the Court notes that the
5 prediction that Hilton will fail in 2031 seems to be at odds
6 with Mr. Morone's approach of only estimating revenues out for
7 ten years because he found predictions after ten years not to
8 be sufficiently reliable. I turn next to group services
9 expenses. Hilton seeks some \$38 million, almost \$39 million,
10 in damages stemming from lost group services expenses in the
11 event the management agreements are rejected. This figure is
12 comprised of two components. The first is some \$17 million in
13 the net present value of lost group services expense, and the
14 second is some \$21.7 million in so-called "key money."

15 The management agreements define group services
16 expenses as each hotel's:

17 "cost for participation in the group services
18 (including reasonable corporate overhead related
19 thereto) as determined in accordance with Section 5.2,
20 excluding reimbursable expenses which shall be charged
21 separately."

22 Group services includes services and facilities
23 relating to advertising, marketing, promotion, publicity,
24 public relations, and group sales services, for all
25 Waldorf=Astoria Hotels and Resorts, as well as any additional

1 program or group benefit such as the Hilton HHonors program,
2 that are provided to all managed hotels. Group services
3 expense are capped at two percent of resort revenue and are
4 distinct from the corporate overhead fee.

5 Hilton argues that the group services expense was
6 expressly provided for in the management agreements; and thus,
7 damages relating to them were foreseeable at the time of
8 contracting. Hilton states that the brand fund that
9 Waldorf=Astoria is currently operating operates at a loss, and
10 that Hilton subsidizes it already, and that Hilton would have
11 to self-fund the amounts formerly contributed to maintain the
12 same level of brand support and marketing for the
13 Waldorf=Astoria brand. Hilton believes that this funding will
14 have to continue until Hilton completely replaces the amount of
15 group services expenses previously contributed by the Hilton
16 Resorts, which its primary expert estimates will take at least
17 five years.

18 In addition to the group services expense itself,
19 Hilton seeks to recover over \$21 million in so-called "key
20 money," which it alleges are payments that it will need to make
21 to obtain additional management agreements to replace the ones
22 that it would lose and therefore, to replace the lost group
23 services expense. Key money represents funds that a management
24 company may be required to pay a hotel owner to obtain those
25 management rights.

1 For their part, the debtors argue that the group
2 services expenses exceed the cap established in the management
3 agreements, and accordingly should be reduced to the amount
4 actually expended, so that Hilton is no longer subsidizing the
5 difference. The debtors further argue that Hilton is also not
6 entitled to the approximately \$17 million in group services
7 expense damages because the management agreements don't permit
8 recovery of such expenses, and that Hilton will replace any
9 lost group services by 2014, and that Hilton can simply elect
10 to avoid incurring any such damages. Finally, the debtors
11 assert there is no basis for Hilton's request for the \$21
12 million in key money.

13 Given the facts and applicable law, the Court grants
14 in part and denies in part Hilton's request for damages in
15 connection with group services expense. The language of the
16 management agreements contemplates the payment of group
17 services expenses for the costs incurred in providing group
18 services to the Waldorf=Astoria brand generally.

19 The evidence established that Hilton has used such
20 funds for their intended purpose. The mere fact that Hilton
21 may spend more than is required for that purpose for its own
22 business reasons is irrelevant. All that matters is that
23 Hilton seeks only to recover the fee provided for under the
24 management agreements, not any extra costs beyond that.
25 Moreover, there was no evidence at trial that Hilton intended

1 in the future to spend less on group services for the
2 Waldorf=Astoria brand than is contemplated by the management
3 agreements.

4 Relatedly, the Court concludes that Hilton's request
5 for payments of these fees for a five-year period represents an
6 appropriate exercise of its duty to mitigate its damages. See,
7 e.g., Shaffer v. Debbas, 21 Cal. Rptr. 2d 110, 114 (Cal. Ct.
8 App. 1993), as well as Shahata v. W Steak Waikiki, LLC, 721
9 F.Supp. 2d 968, 988 (D. Haw. 2010).

10 The Court notes that Hilton has sought some \$17
11 million in group services expense, a number that has been
12 described to me as having been discounted to net present value.
13 While the Court awards group services expense, it notes that
14 the correct number may be different than the \$17 million.
15 While the parties do not address this issue, the Court's prior
16 ruling on the discount rate presumably applies to this
17 component of damages; therefore, this number presumably should
18 be adjusted accordingly consistent with this Court's earlier
19 ruling on the discount rate.

20 Moving on to the second aspect of Hilton's group
21 services claim, the Court rejects Hilton's request for the
22 payment of so-called "key money" for several reasons.

23 As an initial matter, the provision to pay key money
24 is nowhere mentioned in the management agreements, in stark
25 contrast to the group services expense itself. So it is very

1 hard to say the key money was within the parties' contemplation
2 at the time of contract formation as an appropriate measure of
3 damages, and these requested damages are particularly troubling
4 given that the amount of key money sought is in fact greater
5 than the amount of damages actually sought for group services
6 expense under the contract itself.

7 In any event, the evidence at trial was insufficient
8 to support Hilton's claim for key money damages. Hilton cannot
9 identify which hotel agreements this key money will be used to
10 acquire. Instead, Hilton's claim for recovery of key money is
11 not grounded on any specific facts, but rather on Mr. Cline's
12 professional judgment.

13 But Mr. Cline based his analysis, specifically the
14 twenty-five percent ratio assumption he used for calculating
15 key money, upon conversations with Ted Middleton, Hilton's Vice
16 President of Development. Middleton, however, later testified
17 that he had done no analysis of the amount of key money that
18 Hilton would be required to pay to replace the group services
19 expense payments, and was not aware of anyone else at Hilton
20 who performed such analysis.

21 Finally, the Court notes that Hilton itself concedes
22 that whatever management agreements it may one day acquire
23 could very well be management agreements that Hilton would seek
24 to acquire regardless of whether these management agreements
25 are actually rejected.

1 So for all those reasons and the lack of evidence
2 supporting the necessity of key money payments, the Court
3 rejects that component of damages.

4 I now turn to Hilton's request for so-called "brand
5 damages." Hilton seeks approximately \$120 million in damages
6 stemming from its alleged damage to Hilton's Waldorf=Astoria
7 brand. These damages purport to stem from the debtors'
8 termination of the management agreements and flow from the
9 theory that these properties are "iconic and irreplaceable,"
10 which is a phrase that has been used often in this trial and
11 seems not to be in dispute.

12 Hilton argues that such damages were contemplated by
13 the parties when Hilton acquired the agreements in 2006, as
14 part of an effort to launch the Waldorf=Astoria brand. Hilton
15 believed the acquisition of these management agreements for
16 these three resorts would enable Hilton to generate additional
17 business, as well as credibility among investors and within the
18 real estate development community.

19 Hilton further alleges that the loss of the resorts
20 would contribute to tension among other Waldorf=Astoria owners
21 who have already been pressuring Hilton to expand and grow the
22 brand, particularly given that the resorts collectively account
23 for some twenty-five percent of the rooms comprising that
24 brand.

25 Hilton's determination of the amount in brand damages

1 is based on two separate analyses that focus on the time period
2 spanning from 2012 to 2034. The first estimate provides for
3 losses to the existing pipeline of Waldorf=Astoria properties
4 and any impact to the brand's future development program.
5 Utilizing this approach, Hilton estimates brand damages
6 totaling a hundred-and-twelve-some-odd million dollars. The
7 second methodology estimates the overall value of the
8 Waldorf=Astoria brand and determines that the brand will lose
9 56.5 percent of its value. Under that analysis, Hilton
10 estimates damages in the total amount of \$128 million. Taking
11 the midpoint between these two figures, Hilton seeks damages
12 for brand loss in the total amount of \$120 million.

13 The Court denies Hilton's request for brand damages.
14 Like the request for key money, the notion for brand damages is
15 nowhere contained in the management agreements. Instead, the
16 notion of protecting and growing the brand is covered by the
17 management agreements' group services expense, which are
18 damages that have been requested by Hilton and granted by the
19 Court.

20 Moreover, Hilton's request for brand damages is
21 fatally undercut by lack of evidence. Hilton's expert Roger
22 Cline set forth his proposed calculation of damages, presuming
23 that there will be damage to the Waldorf=Astoria name. But
24 other than Mr. Cline's opinion, Hilton has offered no hard
25 evidence of damage to its business or business opportunities,

1 including growth and expansion.

2 For example, Hilton has not provided evidence that a
3 current hotel owner, potential hotel owner, or Hilton HHonors
4 client has presented any concerns about the impact of rejection
5 on the brand. Thus, there is no evidence that any current or
6 future owner would refuse to engage in business with Hilton,
7 would back out of a deal, or would even seek to receive reduced
8 rates.

9 In fact, Hilton's own witnesses testified that no
10 owner has made any indication to Hilton that they would pull
11 their property from Hilton if these three resorts were lost;
12 nor could Hilton's witnesses identify any perspective
13 Waldorf=Astoria properties that would refuse to join the brand
14 as a result of rejection of these management agreements, or any
15 co-branding opportunities that will be lost. Indeed, none of
16 the hotel management agreements contain provisions that would
17 enable a hotel owner a right to terminate its own agreement
18 with Hilton by virtue of the loss of these three management
19 agreements, or at least no witness was aware of any such
20 provision. Hilton has not offered any evidence establishing
21 that any new hotel will elect not to join the Waldorf=Astoria
22 brand because of the management agreement rejections.

23 Accordingly, the Court concludes that Hilton has not
24 shown such brand damage will occur with the reasonable
25 certainty required for being awarded by this Court.

1 The Court recognizes that rejection here has not yet
2 occurred; and thus, this case is different than a normal breach
3 of contract case, where the parties can look back historically
4 at events. This inevitably may mean that it is harder for
5 Hilton to provide evidence of brand damages.

6 But the Court notes that this bankruptcy and rejection
7 proceeding have been the subject of media coverage, and the
8 debtors have made it very clear from the beginning of this case
9 more than a year ago that rejection of these management
10 agreements was a real possibility, and evaluating the
11 management agreements in this case for rejection was one of the
12 three cornerstones of the debtors' restructuring efforts.
13 Given the well publicized nature of these proceedings, the
14 Court cannot grant the very substantial brand damages sought by
15 Hilton without some real-world evidence of damage to the brand.
16 And relatedly, the Court notes that the brand damages sought
17 are more than thirty-five percent of the total damages
18 requested in this case.

19 In addition to the lack of concrete evidence from
20 Hilton's fact witnesses, there are difficulties with some of
21 the assumptions underlying the brand damages calculation. For
22 example, the brand damages sought assume a valuation of the
23 Waldorf=Astoria brand at some 2.265 billion, but that value is
24 contradicted by some of Hilton's own documents and public
25 filings, which set forth a different valuation.

1 Furthermore, Mr. Cline's lost opportunities damages
2 calculation is based on an estimation that, notwithstanding the
3 rejection, Waldorf=Astoria will increase its number of hotels
4 by twenty-two in the near future, an aggressive assumption that
5 appears fundamentally at odds with Hilton's claim that the
6 Waldorf=Astoria brand would be harmed by rejection. And
7 indeed, his projection as to the brand's performance going
8 forward is similarly aggressive into the future, undercutting
9 the argument of brand damage.

10 Finally, Mr. Cline's measure of calculating damages is
11 premised upon the notion that the measure of damages is
12 directly correlated to the number of rooms lost. But that
13 notion is undercut by evidence at trial that there will be
14 times when a brand might lose a hotel from its group, and that
15 loss may not inflict any damage whatsoever to the brand. Mr.
16 Cline did not offer any limiting principle regarding his theory
17 of brand damages to reflect this fact.

18 The rejection of Hilton's brand damage claim is
19 consistent with the applicable case law. Applicable state law
20 generally holds that speculative contract damages cannot serve
21 as a proper legal basis for recovery. See Scott v. Pacific Gas
22 & Electric Company, 904 P.2d 834, 845 (Cal. 1995); that case
23 noting that it was a fundamental principle of contract law that
24 speculative, remote, imaginary, contingent, or merely possible
25 contract damages cannot serve as a legal basis for recovery,

1 and absent any definable loss, a party is entitled only to
2 nominal damages. See also McDevitt v. Guenther, 522 F.Supp. 2d
3 1272, 1287 (D. Haw. 2007); that case highlighting that, under
4 Hawaiian law, speculative damages are not recoverable on
5 actions arising under contract or in tort. See also Southern
6 Union Co. v. Southwest Gas Corp., 180 F.Supp 2d 1021 (D. Ariz.
7 2002); that case holding that a party cannot recover for lost
8 profit damages on the grounds it is too speculative to support
9 recovery.

10 Moreover, the Court notes that the States of Arizona,
11 California, and Hawaii recognize that damages must be proven
12 with reasonable certainty. Walter v. Simmons, 818 P.2d 214
13 (Ariz. Ct. App. 1991); that case putting the burden on the
14 plaintiff to prove damages stemming from a breach of contract
15 with reasonable certainty. See also Maggio, Inc. v. United
16 Farm Workers of America, 278 Cal. Rptr. 250, 264 (Cal. Ct. App.
17 1991); that case noting that damages for loss of profits may be
18 denied as "unestablished" or as being too uncertain or
19 speculative if they cannot be calculated with reasonable
20 certainty. See also Omura v. American River Investors, 894
21 P.2d 113, 116 (Haw. Ct. App. 1995), stating that the extent of
22 loss must be shown with reasonable certainty and cannot be
23 based on mere speculation or guesswork.

24 These principles about certainty are applicable to
25 situations where parties assert claims for lost profits

1 resulting from damage to plaintiff's reputation, and case law
2 from all three states reflect this. See, e.g., Dong Ah Tire &
3 Rubber Co., Ltd. v. Glasforms, Inc., 2010 WL 1691869, at *5
4 (N.D. Cal. 2010); that case holding that there was insufficient
5 evidence to support any award of damages for lost profits or
6 reputation restoration, and that lost profits must be proven to
7 be certain as to their occurrence and their extent. See also
8 Hi-Pac Ltd. v. Avoset Corp., 26 F.Supp. 2d 1230, 1237 (D. Haw.
9 1997); that case holding that plaintiffs cannot recover on a
10 claim that a defendant's breach of contract damaged the
11 plaintiff's reputation, and thereby resulting in lost profits,
12 because the plaintiffs were unable to identify or reasonably
13 calculate any specific lost sales or profits, and accordingly
14 failed to meet their burden.

15 Also instructive are this jurisdiction's decisions
16 relating to claims on reputation damages. Generally, the
17 standard to show loss of good will or reputation damages is
18 high. In ESPN, Inc. v. Office of Comm'r of Baseball, 76
19 F.Supp. 2d 416 (S.D.N.Y. 1999), for example, the Court held
20 that under New York law, in order to recover damages for loss
21 of good will, business reputation, or future profits, the
22 claimant must prove the fact of loss with certainty, and the
23 loss must be reasonably certain in amount.

24 The Second Circuit in Toltec Fabrics, Inc. v. August,
25 Inc., 29 F.3d 778, 781 (2d Cir. 1994), presented a three-part

1 test for recovery:

2 The first being that the claimant must show that there
3 was in fact a loss of good will that must be proved with
4 reasonable certainty.

5 The second being that claimant must present objective
6 proof of that loss.

7 And third, that the claimant must show that the loss
8 was caused by the opposing party's breach.

9 These two cases, while outside the jurisdictions at
10 issue in this proceeding, are instructive in how to value and
11 approach the issue of brand damages here.

12 Hilton relies particularly on two cases in support of
13 its contention that it is entitled to brand damage, but neither
14 case supports its position.

15 In Woolley v. Embassy Suites, Inc., 278 Cal. Rptr. 719
16 (Cal. Ct. App. 1991), the Court considered a request by a hotel
17 branding and management company for a preliminary injunction to
18 prevent a hotel owner from terminating the hotel management
19 agreements. The Court there declined to grant the injunction,
20 noting that computation of a damage award for the loss to
21 Embassy's reputation as a result of wrongful termination could
22 be adequately addressed through expert testimony.

23 Nothing in this case mandates or counsels the award of
24 brand damages here, however.

25 Second, Hilton cites to In re M Waikiki, LLC, 2012 WL

1 2062421 (Bankr. D. Haw. June 7, 2012). In that case, the Court
2 denied Marriott's request for damages to its reputation and
3 good will associated with the hotel owner's alleged breach of
4 Marriott's management agreement. The Court's holding was based
5 on its finding that Marriott presented no evidence of any
6 damage to the brand reputation.

7 Hilton argues that this case supports its position
8 because the Hawaiian Court stated that its holding was without
9 prejudice to the ultimate allowance of Marriott's claims.
10 However, this case does nothing more than support the Court's
11 conclusion that Hilton cannot recover such damages without
12 proof.

13 Finally, I turn to the last item of damages sought,
14 those relating to the potential expansion of the Grand Wailea.
15 Hilton argues that it will incur losses in the amount of some
16 \$9 million in connection with the proposed expansion at the
17 Grand Wailea in the event the debtors reject the management
18 agreement.

19 In April 2012, the County of Maui granted approval of
20 a two-hundred-and-fifty-million-dollar expansion at the Grand
21 Wailea, which would add approximately 310 additional rooms and
22 increase the size of the resort from 780 to 1,090 rooms. Such
23 expansion has been contemplated as far back as 2005.

24 Hilton argues that this expansion, which could be
25 completed by 2017, would add tremendous value to the resort,

1 with Hilton estimating such value at over \$255 million.
2 Specifically, Hilton believes that expansion will result in a
3 significant increase in gross revenues; and accordingly, base
4 management fee income to Hilton, once expansion is completed.
5 Termination of the management agreements would prevent Hilton
6 from reaping the benefits of expansion in the form of increased
7 fees. Hilton opines that, using a thirteen percent discount
8 rate, the net present value of Hilton's foregone base fees and
9 corporate overhead fees total some \$9.8 million.

10 But the Court rejects Hilton's claim for damages
11 associated with a possible expansion of the Grand Wailea.
12 While the debtors have the right to expand the Grand Wailea,
13 the debtors presented testimony at trial that they have no
14 obligation, contractual or otherwise, to undertake the
15 expansion; they also assert that they presently have no plans
16 to expand the Grand Wailea; and third, that they have made no
17 commitment to do so. None of these assertions can credibly be
18 disputed.

19 I parenthetically note that one of Hilton's witnesses
20 briefly suggested that the debtors were contractually obliged
21 to maximize operations at the resort, and that this meant the
22 debtors were obligated somehow to move forward with this
23 possible expansion. That position, I conclude, is a wild over-
24 reach, based on the contract language at issue.

25 But in any event, turning back to the debtors'

1 position here, it's not surprising, given the facts. As
2 previously discussed, the trial was full of evidence regarding
3 the poor performance of the Grand Wailea. The debtors' witness
4 Thomas Shumaker described the approval here obtained by the
5 debtors as a right to expand and conceded that this right was
6 enormously valuable. But he credibly testified that any
7 potential expansion of the Grand Wailea must be viewed in the
8 context of the future performance of the resort, and that the
9 current performance of the resort was a real concern. He also
10 credibly testified that the approval here could be extended
11 out, so as to preserve the debtors' options and this valuable
12 right, while not committing to going forward with any
13 expansion. He and other witnesses noted that the debtors have
14 actually had a right to expand a smaller number of rooms on the
15 same property for some time and have not proceeded to go
16 forward with that expansion.

17 In sum, the debtors' mere consideration of expansion
18 is insufficient to entitle Hilton to damages here. See, e.g.,
19 Greenwich S.F., LLC v. Wong, 118 Cal. Rptr. 3d 531, 553 (Cal.
20 Ct. App. 2010); that case concluding that:

21 "The existence of plans for development does not
22 supply substantial evidence that the development is
23 reasonably certain to be built, much less that it is
24 reasonably certain to produce profits."

25 And that any reliance on a real estate project that

1 may not occur in order to claim lost profits is "inherently
2 uncertain, contingent, unforeseeable, and speculative."

3 See also Vestar Development II, LLC v. General
4 Dynamics Corp., 249 F.3d 958, 962 (9th Cir. 2001); that case
5 holding that there is no way to evaluate, other than through
6 speculation, the profits of a prospective land purchaser on a
7 shopping center it would have built, had the purchaser been
8 permitted to purchase the parcel of land.

9 The Court also notes that Mr. Cline's damages
10 calculation as to the Grand Wailea expansion is somewhat
11 defective because it fails to account for the fact that such
12 expansion would negatively impact the Grand Wailea's
13 performance. It would do so by causing considerable disruption
14 to the resort for the period during which construction was
15 underway, and could result in potential lost business, required
16 discounting, and loss of good will among affected guests. The
17 debtors anticipate that the adverse effect on revenue and
18 earnings could last as long as two years.

19 Relatedly, the Court notes the evidence at trial that
20 group bookings typically have a provision that permits them to
21 cancel their reservation if there's ongoing construction, and
22 that such group bookings are crucial to the Grand Wailea's
23 economic success.

24 That concludes the Court's rulings on the motion to
25 estimate damages from rejection of these three management

1 agreements. Again, as I noted earlier, it's my normal
2 preference to provide a written decision to the parties, but
3 debtors explained the need for a quick resolution of this
4 dispute and requested a decision, if at all possible, by August
5 1st, 2012, which is tomorrow. The need for such an expedited
6 decision relates to the existing deadlines for an exit strategy
7 in this Chapter 11 case, either by plan or sale or some
8 combination of both. And those deadlines for an exit strategy
9 were the result of hotly contested hearings on exclusivity in
10 this case, a dispute that was resolved by agreement of the
11 parties on the timing for an exit strategy. And so I
12 understand the quandary faced by the debtors; and therefore
13 prepared this bench ruling.

14 However, this being a bench ruling and transcription
15 being what it is, I plan to review the transcript to ensure
16 that it accurately reflects my ruling; and therefore reserve
17 the right to amend it accordingly. So I'd ask the debtors to
18 order the transcript on an expedited basis, and I'll take a
19 look at it. And I also request that the debtors prepare an
20 order memorializing my ruling, and obviously consult with
21 Hilton's counsel on the appropriate language to do so.

22 So that didn't take quite an hour and a half; it was a
23 little shorter than my estimate, but that concludes my business
24 for the day.

25 Is there anything that any party needs to raise?

1 MR. LEON: No. I just wanted to take the opportunity
2 to once again thank Your Honor and your staff for accommodating
3 the parties, our schedule, and in particular the debtors' short
4 time constraints. It's very much appreciated on all sides.
5 And we also appreciate Your Honor's attention to this matter.

6 THE COURT: Absolutely.

7 Mr. Neff, is there anything you need to raise at this
8 time?

9 MR. NEFF: Your Honor, did you want the parties to
10 attempt to come up and try to quantify what the amount is?

11 THE COURT: Well, that actually was going to be the
12 next thing I was going to mention. If you noted, there is no
13 ultimate bottom-line quantification. That's because there are
14 many components to this that I was trying to get right, and I
15 was going to leave you all to do the math, particularly as to
16 the discount rate.

17 So yes, I think, it would be the appropriate subject
18 of discussion among the parties, in terms of memorializing the
19 ruling in an order.

20 MR. NEFF: Very good.

21 THE COURT: All right. Thank you.

22 Anything else? All right.

23 MR. LEON: Nothing for debtors.

24 THE COURT: Thank you. Have a good evening.

25 MR. LEON: Thank you, Your Honor. You, too.

1 MR. NEFF: Thank you, Judge.

2 (Proceedings concluded at 5:15 p.m.)

3 *****

4

1 CERTIFICATION

2 I certify that the foregoing is a correct transcript
3 from the electronic sound recording of the proceedings in the
4 above-entitled matter.

5

6

7

8 S/ Coleen Rand
9 Coleen Rand, AAERT Cert. No. 341

August 1, 2012
DATE

10

11 Certified Court Transcriptionist

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13 AudioEdge Transcription, LLC